(3)

No. 90-93

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

R. DOBIE LANGENKAMP, SUCCESSOR TRUSTEE OF THE BANKRUPTCY ESTATES OF REPUBLIC TRUST & SAVINGS COMPANY AND REPUBLIC FINANCIAL CORPORATION,
Petitioner,

v.

C. A. CULP, JULIA CULP, CULP DISTRIBUTING COMPANY, LEROY DENNIS, AND JANET DENNIS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

I. Did the Tenth Circuit Court of Appeals violate this Court's *Granfinanciera* decision (109 S. Ct. 2782 (1989)) by affording a Seventh Amendment jury trial to several creditors being sued by the bankruptcy trustee to recover preferential transfers, even though those creditors had already submitted claims against the bankruptcy estate, and even though *Granfinanciera* explicitly denies a Seventh Amendment jury trial to creditors who file bankruptcy claims and who are then subjected to a preference action in the process of allowing and disallowing bankruptcy claims?

II. Did the Tenth Circuit Court of Appeals create an inter-circuit conflict by (mis)reading this Court's *Granfinanciera* decision (109 S. Ct. 2782 (1989)) as permitting a jury to try the bankruptcy trustee's preference actions under 11 U.S.C. §§ 547(b), 550(a) against creditors who had already filed claims in the bankruptcy case, when other circuits and other lower courts have uniformly and correctly read *Granfinanciera's* plain holding that if a creditor files a claim in the bankruptcy case, the bankruptcy trustee's preference challenge against the creditor must be tried to the bankruptcy court, as in equity?

RULE 29.1 STATEMENT

As required by Rule 29.1 of this Court, Petitioner Langenkamp (as successor trustee) has listed the parent companies, subsidiaries, or affiliates of (i) Republic Trust & Savings Company, and (ii) Republic Financial Corporation at pages *ii* and *iii* of his Petition for a Writ of Certiorari to the U.S. Tenth Circuit Court of Appeals. This listing is currently accurate without any amendment needed in the Reply Brief currently being filed.

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PETITIONER'S REPLY BRIEF

Petitioner submits this Reply Brief under S. Ct. R. 15.6 to address arguments first raised in the opposing brief of Respondents C. A. Culp, Julia Culp, and Culp Distributing Company. This Reply Brief is necessary to correct the factual and legal errors of Respondents C. A. Culp, Julia Culp, and Culp Distributing Company.

REPLY ARGUMENTS

I. THE CULP RESPONDENTS CONTRADICT OR MISREPRESENT THE RECORD IN SEVERAL RESPECTS, ESPECIALLY WHEN THE CULP RESPONDENTS ASSERT THAT THEY FILED NO CLAIM AGAINST THE BANKRUPTCY ESTATE.

Petitioner Langenkamp's certiorari petition #90-93 concerns solely the availability of a Seventh Amendment jury trial to five creditors who submitted claims against a bankruptcy estate and were then sued by the trustee in bankruptcy to recover preferential transfers and to disallow their claims. These creditors were the Culps (C. A. Culp, Julia Culp, and Culp Distributing Company) and the Dennises (Leroy Dennis and Janet Dennis). They are the Respondents to certiorari petition #90-93.[1] However, only the Culps have filed an opposing brief[2] to petition #90-93. The Dennises have filed nothing to oppose petition #90-93 and therefore offer no legal or factual reason to deny the certiorari relief sought by Petitioner Langenkamp. *See* Pet. #90-93 at 18-19.

For their part, the Culps make several statements in their opposing brief which the record either contradicts or does not support. These misrepresentations should not divert attention from the simple but grievous error committed by the Tenth Circuit: permitting a jury trial to claim-filers like the Culps and the Dennises (who have not answered), thereby violating the no-jury-trial-to-claim-filers rule of *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782 (1989).

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[1] Certiorari petition #90-93 is cited here as "Pet. #90-93 at _____." The Appendix to petition #90-93 is cited as "A-_____."

[2] This opposing brief is cited here as "Opp. Br. #90-93 at _____."

1. Disavowed Claim Filing. Two of the three Culps (Julia Culp and Culp Distributing Company) assert that they did not file a bankruptcy claim. *See* Opp. Br. #90-93 at 4. But this flies in the teeth of the Tenth Circuit's express holding that all five Respondents did so:

> Unlike the other appellants [non-parties to certiorari petition #90-93], C. A. Culp, Julia Culp, Culp Distributing Company, LeRoy Dennis and Janet Dennis apparently continued to have monies invested in the debtors at the time of the bankruptcy, *and thus filed proof of claims [sic] with the bankruptcy court.*

A-90 n. 3 (emphasis added). Nowhere have Julia Culp or Culp Distributing Company sought certiorari review of the holding that they, like all the other Respondents, filed claims against the bankruptcy estate. No evidence either in the record before this Court or in any record below contradicts the Tenth Circuit's correct holding that Julia Culp and Culp Distributing Company are claim filers for purposes of *Granfinanciera's* no-jury-trial rule. Notwithstanding the misrepresentation about the claim-filing status of Julia Culp and Culp Distributing Company, no one disputes that C. A. Culp and the Dennises did actually file bankruptcy claims.

Indeed, it is precisely the correctness of this holding for all Respondents that exposes the Tenth Circuit's naked violation of *Granfinanciera:* Having found the presence of bankruptcy claims filed by all five Respondents, the Tenth Circuit nevertheless allowed a jury trial to all five Respondents even though *Granfinanciera* plainly says that claim filers do not get a jury trial. Only the certiorari relief requested by

Petitioner Langenkamp can now correct this severe mistake of the Tenth Circuit. Certiorari relief cannot be reasonably denied for any disavowed claim filing.

2. Assertion of unfair inducement. The Culps provide no factual basis for their allegation that they were somehow duped into filing a proof of claim or that their filing of their proof of claim was somehow less than voluntary and knowing. Only now, after a number of appeals and extensive litigation, do the Culps raise any issue, unsupported as it is, concerning this perceived unfairness. The Culps' allegations should be seen for what they are: an attempt to cloud the record with unsubstantiated allegations so as to divert attention from the core issue presented by certiorari petition #90-93, namely, the Tenth Circuit's misreading of *Granfinanciera*.

3. Bankruptcy process of disallowing claims. The Culps assert that the preference actions below were initiated "purely to recover money from Respondents and was not a part of the summary process of disallowance of a claim." Opp. Br. #90-93 at 7. This not only contradicts the record but is legally wrong. As a part of the adversary proceedings against Respondents to recover the preferential transfers which they received before RTS filed bankruptcy, Petitioner as trustee expressly and separately requested the disallowance of all Respondents' claims against the RTS bankruptcy estate under 11 U.S.C. § 502(d). *See* A-5, A-9 to A-11. This tied the disallowance of each claim directly to the recovery of each preferential transfer.

The Culps make the same mistake as the Tenth Circuit did by dwelling upon a dichotomy of "summary" versus "plenary" proceedings. This dichotomy itself plays no role

under *Granfinanciera*. Contrary to the Tenth Circuit's opinion, the entitlement to a jury trial under *Granfinanciera* does not turn upon whether the trustee's preference action is labelled a "plenary" or "summary" proceeding. Instead, *Granfinanciera* teaches that when a preference defendant has submitted a claim against the bankruptcy estate, the defendant has become a creditor of the estate so that the trustee's preference action and the creditor's claim both become part of the same process of allowing and disallowing claims in bankruptcy. Since this process is not triable to a jury, claim filers (like all Respondents here) are not entitled to a jury trial. Dwelling upon the "plenary" versus "summary" nature of a preference proceeding, as the Culps and the Tenth Circuit do, misses a key teaching of *Granfinanciera*. *See* Pet. #90-93 at 11-13.

4. Immaterial points about preference elements. All courts below held that Petitioner Langenkamp as trustee established all elements for the recovery of a preferential transfer under 11 U.S.C. §§ 547 and 550. *See* A-84 to A-91. No certiorari review of these holdings has been sought by either Petitioner or any Respondents.[3] Accordingly, none of the following allegations have any bearing on the sole jury-trial issue presented by this petition #90-93: RTS was a bank (Opp. Br. #90-93 at 1); RTS was regulated (Opp. Br. #90-93 at 1); how RTS was perceived (Opp. Br. #90-93 at 1); describing of the conduct of RTS business (Opp. Br. #90-93

[3] The Hacklers, the Moores, and the Saieds did challenge one preference element via certiorari petition #90-71. But these parties are not before this Court by reason of this petition #90-93. *See* Pet. #90-93 at *ii*. And neither the Culps nor the Dennises joined as petitioners in petition #90-71.

at 2); and questioning whether the RTS bankruptcy should be under Chapter 7 or Chapter 11 of the Bankruptcy Code (Opp. Br. #90-93 at 5, 6). Nor are any of these points supported by a reference to the record. This Court should disregard them.

II. CERTIORARI RELIEF IS NEEDED TO CORRECT THE TENTH CIRCUIT'S CONTINUING MISAPPLICATION OF *GRANFINANCIERA*.

With little or no analysis, the Culps' opposing brief just mentions some of the authorities cited by Petitioner that show how the Tenth Circuit has misread *Granfinanciera* and created an inter-circuit conflict. Completely side-stepped is the express language of *Granfinanciera* and its rule that the right to a jury trial depends upon the submission of a bankruptcy claim.

The Tenth Circuit's misapplication of this rule here is not an isolated mistake. Since the filing of petition #90-93 on July 9, 1990, another Tenth Circuit case has adopted and repeated the erroneous jury-trial holding rendered here. In *In re Kaiser Steel Corp.*, ____ F.2d ____, No. 90-1013 (10th Cir. Aug. 10, 1990), the debtor-in-possession sought to avoid and recover certain assets from several defendants under 11 U.S.C. § 544 (lien avoidance), § 548 (fraudulent transfer), and § 550 (liability of transferees of avoided transfer). A number of the defendants in *Kaiser* had submitted claims against the Kaiser bankruptcy estate. Even so, the Tenth Circuit in *Kaiser* held that all defendants were entitled to a jury trial, whether or not they had submitted claims against the bankruptcy estate. *See* No. 90-1013, slip op. at 16. For this incorrect proposition, the Tenth Circuit relied solely upon the jury-trial rule framed here after a misreading of *Granfinanciera*. *See id.*

The misnotion that *all* bankruptcy defendants in preference and other avoidance actions are entitled to a jury trial, no matter whether they have submitted claims against the bankruptcy estate, is becoming entrenched in the Tenth Circuit. This is also aggravating the conflict with the other circuits that have correctly read *Granfinanciera* to mean what it says: "under the Seventh Amendment, a creditor's right to a jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate . . . ." *Granfinanciera*, 109 S. Ct. at 2799. Unless corrected through the certiorari relief sought by Petitioner Langenkamp, the Tenth Circuit's mistaken reading of *Granfinanciera* will continue to spread in this circuit and conflict with the other circuits.

RELIEF REQUESTED AND CONCLUSION

This Court should grant the relief requested by Petitioner Langenkamp on pages 18-19 of certiorari petition #90-93. The Tenth Circuit's constitutional error in overlooking or disregarding the rule of *Granfinanciera* is an expanding problem. Only the corrective relief sought by Petitioner Langenkamp can solve this problem.

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